United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 25, 2010

TO: Irving Gottschalk, Regional Director

Region 30

FROM: Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Aurora Sheboygan Memorial Medical Center

Case 30-CA-18691

506-2017-4000 506-4033-1900 506-4033-6000 506-6090-6800

The Region submitted this Section 8(a)(1) case for advice as to whether (1) a respiratory therapist engaged in protected activity when she complained to management about her hospital Employer's use of an unlicensed employee to perform respiratory therapy; and (2) the therapist's conduct was concerted where she and another employee complained separately about the same issue under circumstances that would lead the Employer to perceive that they had acted in concert.

We conclude that the Charging Party's conduct was protected, concerted activity because it arose from collective concerns that were directly related to the therapists' working conditions, potential discipline by their licensing authority, and continued employment. Nonetheless, the Region should dismiss the instant charge, absent withdrawal, because the evidence does not demonstrate that the Employer took adverse action in retaliation for this activity.

FACTS

Charging Party Cheryl Lemke is a licensed respiratory therapist, who worked at the Aurora Sheboygan Memorial Medical Center (the Employer) for approximately five years. To obtain her license from the State of Wisconsin, she completed a two-year respiratory care program at a technical college and passed a certified respiratory therapist exam. Hospitals must employ licensed personnel to perform respiratory therapy; respiratory therapy students who are enrolled in an accredited educational program may also perform such work under the direct supervision of a licensed therapist.

Over a year ago, the Charging Party became concerned about the Employer's practice of allowing an unlicensed employee with the job title of respiratory therapist assistant to perform respiratory therapy. The Charging Party had her mother file a complaint against the Employer with the Joint Commission on Accreditation of Hospital Organizations (JCAHO) based on this practice. In February 2009, JCAHO determined that the assistant was not working beyond the scope of her position and notified the Employer of its decision. The Employer is under the impression that the anonymous complainant was respiratory therapist Aspasia Bostic.

On March 1, 2010, ¹ Bostic was on duty during a staffing shortage. Her supervisor, Jane Martin, asked the respiratory therapy assistant to take some of Bostic's patients. Bostic objected because the assistant was not licensed to perform nebulizer treatments. Martin maintained that it was permissible for the assistant to work under Bostic's license. Bostic disagreed.

Then on March 8, at the respiratory department's monthly meeting, Martin stated that the assistant would continue to perform respiratory therapy procedures as part of her job duties. The Charging Party was present at this meeting, but Bostic was not. The Charging Party was concerned about patients receiving therapy from an unlicensed employee. She was also concerned that this new policy would put the respiratory therapists at risk of losing their licenses. In addition, she believed that billing Medicare for the services of an unlicensed employee was illegal.

After the meeting, the Charging Party went to Martin's office and told her that she had a problem with this decision because the assistant was not licensed to perform the work. The Charging Party maintained that this was illegal and a slap in her profession's face since she had worked so hard for her license. Martin replied that the assistant could perform the work under a co-worker's license and could train on the job. The Charging Party disagreed, asserting that on-the-job training was only available to employees enrolled in a respiratory therapy educational program. At the conclusion of this meeting, Martin instructed the Charging Party to be careful about what she said and who she said it to. The Charging Party telephoned Bostic after this conversation and related what had happened at the departmental meeting and that she had complained to Martin after the meeting.

Sometime thereafter, Bostic showed a copy of Wisconsin statutes governing respiratory therapists to the Charging Party and told her she was going to take it to someone in management. Another respiratory therapist was present and agreed that the assistant should not be performing respiratory therapy. On

¹ All dates are in 2010 unless otherwise noted.

March 15, Bostic did in fact show the statutes to Martin's supervisor, the Employer's Director of Patient Care Services, and explained her concerns. Bostic specifically complained about the assistant performing respiratory therapy under her license. The Director of Patient Care Services said that she would take the matter up with the Director of Clinical and Support Services.

After this meeting, Martin came into the respiratory department office and asked Bostic why she had complained about her. Martin also asked Bostic how she knew that the assistant was performing respiratory therapy. Bostic reminded Martin that she had told Bostic that the assistant would be working under her license. The assistant, who was also present, said that the Charging Party had told Bostic that she was performing this work. Bostic subsequently called the Charging Party and related these events to her.

Later that day, the Employer decided that the assistant would no longer perform treatments that involved administering medication. The Employer's position statement asserts that the Employer changed the policy because several respiratory therapists raised concerns. By an e-mail dated March 17, Martin notified the respiratory therapists of this decision.

At about this time, Martin delivered the Charging Party's evaluation to her. She gave her high marks but advised her to have more respect for people and not to speak up so much at departmental meetings so that others could speak. She then asked the Charging Party who she had spoken to about the respiratory therapy assistant. The Charging Party did not name Bostic but named two other co-workers.

Sometime in May, Bostic filed a complaint with the Wisconsin Department of Regulation and Licensing over the Employer's use of an unlicensed employee to perform respiratory therapy. The Charging Party and one other employee were aware that Bostic filed this complaint. The Charging Party had told Bostic about her mother's JCAHO complaint and had encouraged Bostic to file a complaint with the licensing authority.

Meanwhile, in late April, for personal reasons the Charging Party had sought a transfer to the Employer's affiliate, Aurora St. Luke's Hospital in Milwaukee. On May 13, St. Luke's Hospital offered her a position and she accepted. Shortly thereafter, Martin e-mailed the Charging Party asking if it was correct that she was transferring and that her transfer would be effective June 7. The Charging Party did not respond. Then, on May 21, Martin offered an externship to a respiratory therapy student.

On May 24, the Charging Party called the Human Resources Department at St. Luke's Hospital to let them know that she had changed her mind about transferring. She then e-mailed and left Martin a voice mail advising her that she wanted to continue working at the Sheboygan Hospital. Later that day, Martin told the Charging Party that she had filled .7 of her .9 position with a student extern.² She offered the Charging Party the remaining portion of her position, but she declined it. The Charging Party said that she would talk to St. Luke's again about transferring. Martin told her she did not believe that St. Luke's still wanted the Charging Party. When the Charging Party phoned St. Luke's, she was informed that the department manager was hesitant to hire her because the department could not be flexible around the Charging Party's class schedule.

The next day, the Employer's Human Resources representative called the Charging Party and told her she could stay in her current position through July 3 and would thereafter be converted to a .2 position. On the same day, Martin e-mailed the Charging Party, stating that if the Charging Party wanted the .2 position after July 3, she would have to apply for it because others had expressed interest in it.

The Charging Party filed the instant Section 8(a)(1) charge on June 2, alleging that the Employer had terminated her and/or reduced her hours because she engaged in protected, concerted activity. On June 4, she was again offered a transfer to St. Luke's Hospital, which she accepted. She started work there on June 28.

ACTION

We conclude that the Charging Party engaged in protected, concerted activity but that the evidence does not demonstrate that the Employer took adverse action against her in retaliation for that activity. For that reason, the Region should dismiss the instant charge, absent withdrawal.

First, where employees take action to insure that the Employer is complying with licensing or other regulatory

² The Charging Party worked 90% of the hours of a full-time position and therefore held a ".9" position. The extern was hired to work 70% of the hours of a full-time position.

employment requirements, that conduct is protected by the Act.³ For example, in Georgia Farm Bureau Mutual Insurance Cos., the Board held that insurance agents who reported to the state insurance commissioner's office that their supervisor was mishandling claims were engaged in conduct related to their working conditions. Their failure to report the fraud could have subjected them to license revocation and loss of employment. Further, the employees were worried that they would lose customers if the public learned about the misconduct and considered the employees part of the fraud. 4 Similarly, in Springfield Air Center, two mechanics who refused to violate FAA regulations by installing a vital engine part without proper documentation of repair were engaged in protected activity. The employees reasonably feared that if they installed the part, their licenses could be suspended or revoked. Therefore, their continued employment was at stake.⁵

Here, the Charging Party was acting on a good faith belief that it was unlawful for the Employer to assign an unlicensed assistant to perform procedures under a respiratory therapist's license. Her concerns were directly related to her working conditions in that the Charging Party would have the additional responsibility of overseeing an assistant working under her license. Perhaps more importantly, a misuse of her license could result in a license suspension or revocation and loss of employment. And any resulting harm to a patient could potentially subject her to civil liability.

For these reasons, this case is readily distinguishable from <u>Waters of Orchard Park</u>, where the Board found that employee concern about the quality of patient care was not directly related to nursing home employees' working conditions.⁶ In that case, two certified nursing assistants, concerned about the lack of air conditioning, made a call to a state patient-care hotline, and the speaker identified herself as a relative of a patient. The Board found that Section 7 should not be "expanded to cover every situation where patient

³ See, e.g., <u>Georgia Farm Bureau Mutual Insurance Cos.</u>, 333 NLRB 850, 850-51 (2001); <u>Springfield Air Center</u>, 311 NLRB 1151, 1154-55 (1993).

⁴ 333 NLRB at 850.

⁵ 311 NLRB at 1154-55. See also <u>Cintran</u>, <u>Inc.</u>, 297 NLRB 178, fn. 2, 180 (1989) (employees' conduct was protected when they refused to drive routes that they in good faith believed would have required violation of federal regulations limiting consecutive hours of driving).

^{6 341} NLRB 642, 643-45 (2004).

care is involved." 7 The Board expressly distinguished and did not overrule, however, cases like this, where employees charged with patient care acted also upon concerns directly related to working conditions. 8

Second, we find that the Charging Party's conduct was concerted. The Board's test for concerted activity is whether activity is "engaged in 'with or on the authority of other employees, and not solely by and on behalf of the employee himself.'" In setting out this test, the Board noted that the question is "a factual one" and that it will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]" Thus, individual activities that are the "logical outgrowth of concerns expressed by the employees collectively" are concerted. In addition, an employer's

 $^{^{7}}$ Id. at 644.

⁸ See, e.g., Misericordia Hospital Medical Center, 246 NLRB 351, 356 (1979), enfd. 623 F.2d 808 (2d Cir. 1980) (nurses' complaints to hospital accreditation committee about staffing levels and the number of patients to be cared for were directly related to nurses' working conditions); Parr Lance Ambulance Service, 262 NLRB 1284, fn. 1 (1982), enfd. 723 F.2d 575 (7th Cir. 1983) (driver's refusal to operate inadequately equipped ambulance was directly related to the performance of work, EMT faced possibility of license revocation, and both could be subject to a lawsuit if they were unable to provide adequate care). See also Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. Nevada Service Employees Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009) (in a post-Orchard Park decision, the Board found that an RN's public statements about the effects of hospital staffing levels upon patient care were protected where those statements grew out of a labor dispute over staffing levels).

 $[\]frac{9}{\text{Prill v. NLRB}}$, 281 NLRB 882, 885 (1986), affd. sub nom. $\frac{\text{Prill v. NLRB}}{\text{U.S. }}$, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

 $^{^{10}}$ <u>Id.</u> at 886.

¹¹ See, e.g., Five Star Transportation, Inc., 349 NLRB 42, 59 (2007), enfd. 522 F.3d 46 (1st Cir. 2008) (drivers' letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting); Mike Yurosek & Son, Inc., 306 NLRB 1037, 1038-39 (1992), enfd. 53 F.3d 261 (9th Cir. 1995) (four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over a new scheduling policy).

belief that employees were acting in concert is sufficient to bring them under the Act's protection, even if their activities were not actually concerted. 12

Here, there is ample evidence that the Charging Party was not acting solely on behalf of herself and that any individual activity grew out of group concerns. While the Charging Party approached her supervisor after the departmental meeting on her own to complain about the Employer's policy of using unlicensed personnel to perform respiratory therapy work, her co-employee Bostic had already complained about the same policy. There were subsequent conversations about the matter between the Charging Party and Bostic, as well as between the Charging Party and other therapists. When Bostic went to management with her concerns, she had first discussed her plan with the Charging Party in the presence of a third therapist, and they had all agreed that the Employer's policy was wrong.

Further, the Employer perceived her activity as concerted. Martin asked both Bostic and the Charging Party whom they had conferred with in the department. During Martin's exchange with Bostic, the assistant told Martin that it was the Charging Party who had informed Bostic that the assistant was performing respiratory therapy. During Martin's conversation with the Charging Party, the Charging Party named two other employees with whom she had discussed the issue. Moreover, the Employer's position statement conceded that several respiratory therapists raised concerns about this issue and it was because of those concerns that it changed its policy.

Even though the Charging Party engaged in protected, concerted activity, however, we conclude that the evidence does not demonstrate that the Employer retaliated against her for that activity. The Employer did not terminate the Charging Party or take any other adverse action against her. Instead, for personal reasons the Charging Party applied for and accepted a transfer to St. Luke's. When the Employer learned of the transfer and e-mailed her for confirmation and the effective date, she failed to respond to the e-mail. By the time that the Charging Party changed her mind, the Employer had filled her position. Although the Employer may have made things difficult for her -- requiring her to bid on the remaining portion of her position and perhaps interfering with

Five Star Transportation, Inc., 349 NLRB at 59; Monarch Water Systems, 271 NLRB 558, 558 (1984) (Board held it unnecessary to determine whether two employees in fact engaged in concerted activity where employer perceived that two employees jointly instigated DOL compliance investigation and discharged one of them as a result).

her regaining a transfer to St. Luke's -- she ultimately received that transfer, without a break in service. It would also be difficult to establish a causal link between any adverse consequences and the Charging Party's protected, concerted activity. Thus, Bostic, who was even more vocal in her opposition to the Employer's policy, did not suffer any retaliation. Accordingly, we conclude that the Region should dismiss the instant charge, absent withdrawal.

B.J.K.